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Summary record of the 3396th meeting
Held at Headquarters, New York, on Monday, 7 May 2018, at 10 a.m.

Contents

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

Identification of customary international law

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18-07248 (E)

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Chimimba	Senior Assistant Secretary to the Commission

The meeting was called to order at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (*continued*) (**A/CN.4/712** and **A/CN.4/715**)

The Chair invited the Special Rapporteur to sum up the debate on his fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715).

Mr. Nolte (Special Rapporteur) said that the debate had been surprisingly rich, given the broad basic agreement on almost all issues, and he thanked members of the Commission for their thoughtful contributions. Several references had been made to both the rigour and the flexibility of his approach; he hoped that the former applied to the substance of his work and the latter to his spirit of compromise, although a rigorous approach to substance implied certain limits on the possibility of finding compromises. Ms. Lehto had said that, as she was joining the debate at the stage of the second reading of the draft conclusions on the topic, she intended to be cautious in her comments. However, even those who had participated in the debate from the beginning sometimes needed to be reminded of its history. Mr. Jalloh had observed that, if possible, the general agreement that had been reached thus far should not be called into question without compelling reasons and that many issues had been addressed in the commentaries. The draft conclusions represented a collective effort of the Commission, which had refined the text a number of times over the years. Moreover, a number of members had rightly said that the comments by States gave no reasons for major amendments.

Very few comments had been made on draft conclusion 1 [1a] (Introduction), and only one of them concerned a substantive matter, namely the suggestion by Sir Michael Wood that the words "between States" should be added at the end of the draft conclusion, or that the relationship between the topic and the rules on interpretation in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations might be explained in the commentary. He was open to the latter suggestion concerning the commentary; however, he took the view that, although the draft conclusions mainly dealt with treaties between States, they might also be relevant to treaties to which non-State actors were also parties. He therefore considered, along with some other members, that the scope of the topic should not be narrowed down at the last minute.

There had also been very few substantive comments on draft conclusion 2 [1] (General rule and means of treaty interpretation). The most radical point had been made by Mr. Rajput when he had stated that subsequent agreements and subsequent practice, under article 31 (3) of the 1969 Vienna Convention on the Law of Treaties, were an appendage to context for the purposes of interpretation and should therefore not be unduly emphasized. Sir Michael Wood, on the other hand, had expressed the view that subsequent agreements and subsequent practice were of equal weight to the means of interpretation referred to in article 31 (1) of the 1969 Vienna Convention. The Special Rapporteur reminded members that the question of the role and the relative importance of subsequent agreements and subsequent practice among the various means of interpretation had been the subject of a thorough debate in 2013 that had resulted in the current formulation of the draft conclusion; that formulation had satisfied proponents of different views. He therefore proposed that the existing formulation should be changed only when there were widely accepted reasons to do so.

Sir Michael Wood had proposed a different, fundamental change to the draft conclusion, namely the deletion of paragraphs 2, 3 and 4. He had taken the view that the inclusion of parts of article 31 (3) in paragraph 3 detracted from the unity of the general rule of treaty interpretation and that no separate reference to "other subsequent practice" was needed or helpful in the draft conclusion. The Special Rapporteur reminded members that the question of how to describe and reflect the pertinent provisions of the 1969 Vienna Convention for the purpose of the draft conclusions — including the concern that articles 31 and 32 should not be called into question or misrepresented and that subsequent agreements and subsequent practice should not be overemphasized in the context of treaty interpretation — had also been the subject of thorough debate in the Commission. He therefore hoped that those questions would not be reopened in the Drafting Committee and was encouraged by Sir Michael Wood's remark that his concerns might be accommodated in the commentary.

Mr. Rajput had expressed concern that the word "rule", in the singular, in the phrase "the rule on supplementary means of interpretation" in paragraph 1 of the draft conclusion was inconsistent with the reference to "supplementary means of interpretation", in the plural, in article 32 of the 1969 Vienna Convention. Similarly, Sir Michael Wood had stated that the reference to "the rule on supplementary means" obscured the division in article 32 between the broadly envisaged use of supplementary means to "confirm" the meaning of a treaty and the tightly conditioned use of such means to "determine" the meaning. The Special

Rapporteur noted that the question of whether article 32 actually consisted of two rules or provisions rather than simply two aspects of a single rule was a substantive issue and not merely a technical point of drafting. However, it was not necessary at the current stage to determine whether that understanding of article 32 was correct. The distinction between "confirm" and "determine" was flagged in the commentary to the draft conclusion and could be elaborated upon as far as necessary there.

He considered that the unity of the process of treaty interpretation, as reflected in articles 31 and 32 of the 1969 Vienna Convention, was well captured in draft conclusion 2 as it currently stood, and that there was a logic in the current order of the paragraphs. He would not, however, be fundamentally opposed to Mr. Grossman Guiloff's proposal that paragraph 5 should be moved, so that it would become paragraph 2, if that was the preference of the other members of the Commission. He was also willing to confirm in the commentary that the rules on interpretation set out in articles 31 and 32 applied, as a matter of customary international law, to treaties that predated the 1969 Vienna Convention, as proposed by the United Kingdom and supported by Mr. Grossman Guiloff, Mr. Hassouna and Mr. Ruda Santolaria. Lastly, he was pleased that the Spanish-speaking members, namely Mr. Grossman Guiloff, Ms. Escobar Hernández, Mr Ruda Santolaria and Mr. Vázquez-Bermúdez, accepted his proposal to replace the words "*en el sentido del*" in the Spanish version of paragraph 4 with the words "*en virtud del*" and agreed that it was necessary to verify whether that change had implications for the other language versions of the text.

Support had been expressed for draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation) by Mr. Hassouna and Mr. Rajput. Mr. Cissé had expressed some doubts about the usefulness of the draft conclusion but had not objected to it or proposed an alternative formulation.

On draft conclusion 4 (Definition of subsequent agreement and subsequent practice), one set of comments had focused on the proposal by Mr. Grossman Guiloff to move the definition of "agreement" from draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty) to draft conclusion 4, so as to facilitate the understanding of the term "subsequent agreement". Mr. Reinisch had expressed openness to that proposal but Ms. Lehto and others had expressed the view that the legal nature of a subsequent agreement had been sufficiently addressed in the commentary to draft conclusion 4. He wished to point out that the set of draft conclusions was structured in such a way as to move from the general to the specific, so that not every question that came to the mind of the reader was immediately addressed. Accordingly, any questions that arose regarding the term "agreement" were addressed in draft conclusion 10. If the definition of the term were moved to draft conclusion 4, additional drafting issues would arise. He therefore proposed to rely on the reference to draft conclusion 10 made in the commentary to draft conclusion 4 and/or on the capacity of the reader to digest the set of draft conclusions quickly.

A second set of comments on draft conclusion 4 concerned the use of the expression "the parties" in paragraph 1. Mr. Park, supported by Ms. Oral, Mr. Ruda Santolaria, Mr. Ouazzani Chahdi and Mr. Rajput, had proposed that the expression should be changed to "all the parties". It was true that, in that paragraph, "the parties" meant "all the parties"; that point was made clear in the commentary. By contrast, in the definition of subsequent practice in paragraph 2, it was appropriate, as also suggested by Mr. Park, not to refer to "all the parties", because it was not the case that every party must have engaged in subsequent practice and also because the necessary agreement of the remaining parties might, in certain circumstances, be established by their silence. That reasoning was consistent with the position expressed by the Commission in its 1966 commentaries to the draft articles on the law of treaties: "By omitting the word 'all' the Commission did not intend to change the rule. ... It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice." In the Special Rapporteur's view, the use of the word "all" in paragraph 1 but not in paragraph 2 could give rise to a misunderstanding by suggesting that only subsequent agreements and not subsequent practice required the agreement of all the parties. He therefore preferred to retain the existing formulation of paragraph 1, a position supported by Mr. Šturma and Mr. Vázquez-Bermúdez.

Draft conclusion 5 (Attribution of subsequent practice) had given rise to an important debate regarding the use of the term "attribution", a debate which he had himself invited by stating his sensitivity to the concern of the United States that the use of that term could give rise to a misunderstanding that all conduct that could be attributed to a State under the articles on responsibility of States for internationally wrongful acts could be seen as subsequent practice for the purpose of treaty interpretation under articles 31 and 32 of the 1969 Vienna Convention. Indeed, when he had first proposed what later became draft conclusion 5, he had referred

not to attribution in the sense of the articles on State responsibility but to attribution "to a State party for the purpose of treaty interpretation" (see A/CN.4/660, para. 125). It was only after the debate in the Commission, in which some members had insisted that a reference should be made to the articles on State responsibility, that he had agreed to refer to the articles in the commentary.

The debate at the current session had resulted in broad agreement, in substance, on the need to further clarify the fact that "attribution" in the sense of the articles on State responsibility did not fully cover what was referred to in draft conclusion 5. In their comments, members had taken one of two basic approaches. The first approach consisted in dropping the concept of attribution and referring only to "conduct"; an explanation could then be given in the commentary as to what kinds of conduct could and should be regarded as subsequent practice. If that approach were to be taken, it should also be made clear in the commentary that the conduct must be attributable in the sense of State responsibility as a necessary, but not a sufficient, condition for it to count as subsequent practice. The second approach consisted in retaining the concept of attribution but reformulating paragraph 1 to make it clearer that conduct must not only be attributable to a State in the sense of State responsibility but must also be undertaken in a recognized application of a treaty, along the lines of the proposal in the report. In that case, it would need to be made clear in the commentary that such attribution was not the only condition for conduct to count as subsequent practice. He considered that either approach was appropriate to achieve the generally accepted aim and was confident that the Drafting Committee would, in a spirit of cooperation, find a satisfactory solution. He had taken note of the various proposals by members regarding the formulation of the provision and would take them up in the Drafting Committee.

Paragraph 2 of draft conclusion 5 had been addressed by only a few members, most of whom had expressed their support. Mr. Nguyen had expressed certain doubts and had proposed amended wording, which the Drafting Committee could discuss.

With regard to draft conclusion 6 (Identification of subsequent agreement and subsequent practice), comments had been made only on paragraph 1. He had created some confusion by recommending, in his report, that the word "normally", rather than being deleted, should be replaced with the word "always". He had viewed that change as necessary following his recommendation to take up the proposal of Ireland that the words "for example" should be inserted after the words "this is not normally the case". However, in his introduction of the report at the current session, he had retracted the proposal to add the word "always", which had also been rightly questioned by Mr. Park. His recommendation, therefore, was to insert the words "for example" and simply delete the word "normally" without replacing it. In substance, all members who had commented on the paragraph, namely Mr. Šturma, Mr. Grossman Guiloff, Ms. Oral and Mr. Hassouna, had expressed support for that recommendation, which should provide a good basis for the deliberations of the Drafting Committee.

On draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), Mr. Rajput had proposed a reformulation of the second sentence of paragraph 1, so as to avoid creating the impression that a hierarchy existed among the alternatives given. The Special Rapporteur was not persuaded that the text created such an impression. With regard to paragraph 2, Mr. Grossman Guiloff had proposed that the word "clarification" should be replaced with the word "confirmation", since the word "confirm" was used in article 32 of the 1969 Vienna Convention. However, "confirm" was not the only term used in article 32 — "determine" was also used — and "clarification" was a general term that encompassed both those alternatives. In a similar vein, Mr. Nguyen had proposed that "clarification" should be replaced with "identification". The Special Rapporteur hoped that Mr. Rajput, Mr. Grossman Guiloff and Mr. Nguyen could accept the existing formulation of paragraphs 1 and 2, which had been the subject of thorough deliberation.

With regard to the first sentence of paragraph 3, Mr. Rajput had expressed doubts about the use of the word "presumed" on the grounds that it amounted to a legal fiction that subsequent agreement or practice had to be presumed to be limited to treaty interpretation and did not extend to amendment or modification. However, the word "presumed" referred to an interpretative presumption, in other words, an aid for interpreters when they had to determine whether a specific subsequent agreement or subsequent practice amounted to an effort to amend or modify a treaty. Interpretative presumptions were commonplace in law, for example presumptions in national law that laws were constitutional. In a similar vein, the Commission itself had formulated an interpretative presumption when it had stated, in its 1964 commentaries to the draft articles on the law of treaties, that "the Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties". The question

of whether a subsequent agreement or a subsequent practice was aimed at interpreting or modifying a treaty was a preliminary question that needed to be resolved before the role of the subsequent agreement or subsequent practice in the interpretation of the treaty could be determined. That question fell squarely within the scope of the topic and was of practical importance. Mr. Murphy had expressed the view that there was no basis for the presumption expressed in that sentence, at least as it related to an agreement subsequently arrived at. He had therefore proposed that the sentence should be deleted. A number of other members had expressed doubts about the same sentence, albeit for different reasons, while further members had stated that they found the current formulation of the paragraph to be satisfactory or acceptable.

As had been noted before, the three sentences in paragraph 3 were interrelated. They were based on a wealth of court decisions and other supporting material, which were described in the commentary. In several of the decisions cited, the courts had concluded, despite certain indications to the contrary, that an agreement subsequently arrived at or a practice in the application of a treaty had had the effect of contributing to an interpretation of a particular treaty provision and did not amount to an amendment or modification of, or an attempt to amend or modify, the treaty. The need to determine whether a subsequent agreement or subsequent practice contributed to the interpretation of a treaty or aimed at its amendment or modification was itself a question of interpretation, which was an important aspect of the topic. Indeed, as part of its work on the law of treaties, the Commission had considered the effect of subsequent agreements and subsequent practice with respect both to the interpretation and to the amendment or modification of a treaty. It had had good reason to do so, because it was appropriate to help interpreters to determine where interpretation ended and amendment or modification began. The matter was addressed in paragraph 3 precisely in order to provide a safeguard against the draft conclusions being used to advocate modification of a treaty through subsequent practice, as had been noted by Mr. Hmoud. The "without prejudice" clause — the third sentence of the paragraph — was not enough on its own to provide interpreters with guidance. For those reasons, he was convinced that paragraph 3, as a whole, was well grounded and should be maintained. He was nonetheless open to the possibility of making smaller changes that reinforced the basic thrust of the paragraph. One such change, favoured by Ms. Galvão Teles, Mr. Ruda Santolaria, Ms. Lehto and Mr. Grossman Guiloff, would be to make the third sentence of paragraph 3 a separate paragraph so as to emphasize the distinction between interpretation and amendment or modification.

As to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time), Ms. Oral and Mr. Ouazzani Chahdi had expressed doubts about the word "presumed", while Mr. Murphy had said that it should be deleted unless the Special Rapporteur could explain why "presumed intention" was a superior formulation to "intention". Mr. Murase had said that the expression "presumed intention" seemed to prioritize the original intent of the parties and subordinate other factors. Mr. Reinisch, Mr. Hmoud and Mr. Ruda Santolaria, on the other hand, had argued in favour of retaining the expression. Mr. Hmoud in particular had pointed out that the International Court of Justice had used the word "presumed" to refer to the intention of the parties to a treaty in its 2009 judgment in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. Paragraph (9) of the commentary to the draft conclusion also addressed Mr. Murase's concern by quoting the Commission's early commentary to the draft articles on the law of treaties: "the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation". There was thus considerable support for the expression "presumed intention" in the context of the draft conclusion. However, should the members of the Commission continue to have doubts, the alternative would not be simply to delete the word "presumed" but rather to remove the reference to "intention", whether presumed or not. In fact, in his original proposal he had deliberately omitted any reference to "intention", and the Commission had agreed on the current formulation only after a long debate. If members wished to discuss the possibility of removing the reference, the debate on the draft conclusion would have to be fully reopened, which did not seem warranted at the current stage.

With regard to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), the only issue that had been addressed by members was the proposal by the United Kingdom that reference should be made in paragraph 2 to the consistency and breadth of subsequent practice, a proposal which he, in turn, had recommended. Mr. Murphy had strongly objected, stating that the proposed change made no sense because there must already exist consistency and breadth in order for the practice to establish the agreement of all the parties as required by article 31 (3) (b) of the 1969 Vienna Convention. Mr. Murase and Mr. Park had voiced similar concerns. The reason for the recommendation to accept the proposed change was that, since subsequent

practice under article 31 (3) (b) did not need to be the practice of all parties but must only establish the agreement of all parties, the number of parties that actually engaged in a practice would often be relevant for the question of the weight of a subsequent practice in the process of interpretation. That explanation could be included in the commentary so as to prevent confusion, which would allay the concern expressed by Ms. Lehto. Another possibility would be to consider Mr. Murase's proposal that paragraph 2 should be amended to read as follows: "The weight of subsequent practice under article 31 (3) (b) depends, in addition, on whether and how conduct is repeated and how many parties actively engage in the subsequent practice." The Special Rapporteur's preference, however, was to add a reference to consistency and breadth, as recommended in his report, a position for which a number of members had expressed support.

Regarding draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), Mr. Murphy, commenting on the first sentence of paragraph 1, had said that, in the context of article 31 (3) (b) of the 1969 Vienna Convention, it was not a requirement that each party should be "aware of and accept" a "common" understanding of all the parties. For example, the Supreme Courts of three States parties to a treaty might all render decisions in which they arrived at the same interpretation of a treaty provision without being aware of each other's decisions. In that case, according to Mr. Murphy, there would be no need to establish that each Supreme Court was aware of a common understanding of all three Supreme Courts. He had therefore proposed that the words "a common" should be replaced with the words "the same", so that the phrase in question would read "requires the same understanding regarding the interpretation of a treaty which the parties are aware of and accept". Sir Michael Wood and Ms. Oral seemed to lean in the same direction. Most members, however, preferred to keep the existing formulation of the sentence. As pointed out by Mr. Ouazzani Chahdi, it was noted in the report that the expression "common understanding" was used in the 1964 and 1966 commentaries to the draft articles on the law of treaties.

The Special Rapporteur was sensitive to the concern expressed by Mr. Murphy; in fact, the Commission had already taken account of it to some extent by stating, in paragraph (8) of the commentary to the draft conclusion, that "in certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties that are implemented at the national level". The example given by Mr. Murphy might be just one of those circumstances. The Special Rapporteur therefore proposed to expand on such circumstances in the commentary, without, however, changing the formulation of the draft conclusion or the point of principle that was reflected therein.

With regard to the second sentence of paragraph 1, Sir Michael Wood and Mr. Hassouna had confirmed the point made therein, which was that a subsequent agreement need not be legally binding. Mr. Hmoud had said that he remained of the view that such an agreement should be legally binding; the Special Rapporteur did not, however, regard that observation as a fundamental objection. Sir Michael Wood had proposed a purely linguistic change, which the Drafting Committee would consider.

Paragraph 2, which dealt, *inter alia*, with the role of silence, had not given rise to many comments, except for an expression of support by Mr. Nguyen and Mr. Grossman Guiloff and the expression of certain doubts by Mr. Šturma, who had not, however, proposed an alternative formulation.

On draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties), most comments had related to the question of whether the word "consensus" in paragraph 3 should be changed or removed. Mr. Hmoud had proposed that it should be removed because consensus was procedural and did not reflect unanimity; Ms. Oral had made the same proposal on the grounds that the reference added an element of confusion. Other members, however, had expressed support for or acceptance of the reference. Mr. Gómez-Robledo had proposed that, since there was no agreed definition of the word "consensus", it would be preferable to refer to decisions that were adopted with or without a vote.

The Special Rapporteur considered that the reference to consensus should be kept. It was true that the term was procedural, but that was exactly the point: consensus was the most important procedure in practice in the given context. The reference should not, therefore, give rise to confusion. With regard to the formulation, there seemed to be some support for placing the reference in parentheses, as he had proposed in his report, but also support for retaining the reference as it stood. He therefore leaned towards the view that no change was necessary; however, it was for the Drafting Committee to consider the matter.

With regard to paragraph 3, Mr. Murphy had proposed that the word "all" should be inserted before "the parties" in the phrase "agreement in substance between the parties", given that not all the parties were necessarily present at a conference of States parties. The

Special Rapporteur did not think that such a change was necessary, for reasons similar to those he had described in relation to the proposed addition of the word "all" in paragraph 2 of draft conclusion 4. It was true that a decision of a conference of States parties at which not all parties were present could not, as such, embody a subsequent agreement of the parties regarding its interpretation. However, it might embody such an agreement after some time had passed, if the parties that had not been present did not object when the circumstances called for some reaction in the sense of draft conclusion 10, paragraph 2.

With regard to draft conclusion 12 [11] (Constituent instruments of international organizations), in order to accommodate the request of some States to make a clearer distinction between the subsequent practice of the parties and the practice of an international organization, he had recommended in his report that the words "of the parties" should be added to paragraph 2 after both occurrences of the words "subsequent practice", as proposed by Romania and Spain. Most members had expressed agreement with that proposal.

Mr. Murphy had proposed a reformulation of paragraph 3 of the draft conclusion, which would reopen the debate on the whole paragraph. The wording of the paragraph had been agreed upon after a thorough debate in the Drafting Committee and it had been accepted by the Commission as a whole, together with the commentary, which had been adopted word by word. The paragraph could not, therefore, be described as a last-minute compromise. It also did not state, as Mr. Murphy suggested, that the practice of an international organization constituted the object and purpose of a treaty; it merely stated that such practice might contribute to the interpretation of the organization's constituent instrument when applying articles 31 (1) and 32 of the 1969 Vienna Convention. Such reasoning had been used in the judgment of the Caribbean Court of Justice referred to in the report. It was true that the primary element of the judgment — that a particular decision of the Caribbean Community was "furthering a fundamental Community goal of free movement ... envisioned by the RTC [Revised Treaty of Chaguaramas establishing the Caribbean Community]" — was not related to the issue at hand. However, the Court had also held that the Community's decision clarified one aspect of the goal of the Treaty. Hence it had drawn, *inter alia*, on the practice of the organization when determining the object and purpose of the Treaty, even if it had not explicitly referred to article 31 (1). That decision was just one example of how the practice of an international organization might contribute to the interpretation of its constituent treaty; further examples were given in the commentary. During the debate, Ms. Lehto had expressed her support for the reference to articles 31 (1) and 32 for the reasons explained in the commentary; Mr. Ouazzani Chahdi had also expressed similar agreement. The Special Rapporteur therefore hoped that Mr. Murphy could agree to retain the current formulation of paragraph 3.

Draft conclusion 13 [12] (Pronouncements of expert treaty bodies) had given rise to the most comments, no doubt because he had exceptionally chosen to reopen the debate on a paragraph that had not been included in the draft conclusion as adopted on first reading. The reactions to his proposal to add that paragraph to the draft conclusion as a new paragraph 4 had been mixed. He reminded members of his two reasons for making the proposal at such a late stage.

The first reason was that a letter had been received from the Chair of the Human Rights Committee after the completion of the first reading, stating: "In the Committee's view, the contribution that pronouncements of expert treaty bodies can have, whether or not they give rise to a subsequent practice by the parties, would merit clearer recognition in the draft conclusions than in the form of a saving clause in paragraph 4 of conclusion 13 [12]." That observation deserved to be considered in a plenary debate. Indeed, certain States, such as the Netherlands, had stated in the Sixth Committee that a more elaborate discussion of the legal characterization of the practice of expert treaty bodies would have been welcome.

The second reason was that he felt that the debates in the Commission and the Sixth Committee had suffered from some confusion, for which he felt partly responsible, resulting from the frequent failure to distinguish between the subsequent practice of the parties to a treaty and other forms of relevant practice, such as the practice of an international organization. Such other forms of relevant practice were not only those referred to in draft conclusion 12, paragraph 3. The pronouncements of the Human Rights Committee, for example, had been referred to as the "practice of the Human Rights Committee" by the International Court of Justice in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In his view, the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" was not confined to the practice of States; if the pronouncements of treaty bodies could be counted as "practice", they fell squarely within the scope of the topic. The debates in the Commission and the Sixth Committee, however, had focused on the judgment in the case concerning

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), in which the Court had referred to the pronouncements of the Human Rights Committee as "interpretative case law" rather than "practice". The discussion had thus turned into a debate on the role and value of such pronouncements more generally. However, the Court's use of the term "interpretative case law" had not, in his view, been intended to change its basic characterization of those pronouncements as a form of practice. For the reasons explained, his proposal should not be seen as surprising or illegitimate, as suggested by Mr. Murphy; nor was he was creating an artificial reason to refer to the role of expert treaty bodies, as Mr. Rajput had said.

The debate had shown that the number of members who supported the proposal was almost equal to the number who opposed it. Mr. Šturma and Mr. Park had said that they were open-minded about it but had pointed out that the proposed new paragraph 4 would have to be reconciled with the existing "without prejudice" clause. Ms. Escobar Hernández, while expressing some sympathy for the proposal, had also made her own proposal for amendment. There were, however, no clear conclusions to be drawn from the debate because different members had given different reasons for their points of view. Some members who had endorsed his proposal, for example, had said that they did not consider the pronouncements of expert treaty bodies to be subsequent practice of the parties; others who had opposed it had done so on the grounds that such pronouncements did not fall within the scope of the topic. In order to adopt a proposed formulation, it would be necessary to reach an understanding on the question of whether the pronouncements of expert treaty bodies constituted a form of practice that fell within the scope of the topic.

He agreed with those members who considered that the current topic was not the appropriate context in which to address in a comprehensive and general manner the legal significance and effect of the pronouncements of expert treaty bodies. For that reason, he proposed to keep the "without prejudice" clause. However, the retention of that clause did not preclude the addition of the proposed new paragraph. "Practice" was, after all, the term that had been used by the International Court of Justice to refer to such pronouncements. The real question, which had not been fully addressed in the debate, was the extent to which such pronouncements played a role that was analogous to the practice of international organizations in the application of their constituent instruments. He hoped that the Drafting Committee would give him an opportunity to explain that limited aspect of the question with a view to arriving at a good solution.

Few other comments had been made on draft conclusion 13. Mr. Hmoud and Mr. Nguyen had endorsed the recommended change to the reference to silence in the second sentence of paragraph 3. Sir Michael Wood had expressed doubts about the term "pronouncements", despite having agreed to it on first reading, while Mr. Gómez-Robledo had proposed that it should be replaced with the term "determinations". The Special Rapporteur had explained, in his fourth report (A/CN.4/694), that he had chosen the term "pronouncements" because of its comprehensiveness and neutrality; after debates in the plenary and the Drafting Committee, the Commission had accepted it. In the debate at the current session, Mr. Jalloh and other members had endorsed it. The Special Rapporteur therefore hoped that Sir Michael Wood and Mr. Gómez-Robledo could find it acceptable.

With regard to the final form of the draft conclusions, Mr. Murase had proposed that the term "guidelines" rather than "conclusions" should be used. While the Special Rapporteur appreciated that Mr. Murase's aim was as to attribute greater legal authority to the outcome of the Commission's work on the topic, he considered that it was more appropriate to emphasize the fact that the Commission's work rested on conclusions from the identification and interpretation of sources such as articles 31 and 32 of the 1969 Vienna Convention and from the observation of practice. Many other members supported that approach.

He proposed that the Commission should refer the draft conclusions to the Drafting Committee.

The Chair said that he took it that the Commission wished to refer draft conclusions 1 [1a] to 13 [12] to the Drafting Committee, taking into account the comments made during the debate and the recommendations of the Special Rapporteur.

It was so decided.

Identification of customary international law (agenda item 6) (**A/CN.4/710**, **A/CN.4/716** and **A/CN.4/717**)

Sir Michael Wood (Special Rapporteur), introducing his fifth report on identification of customary international law (A/CN.4/717), said that the report focused on the written and oral comments and observations of States regarding the draft conclusions and commentaries adopted on first reading at the sixty-eighth session of the Commission in 2016. It also contained a section concerning the memorandum

prepared by the Secretariat on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which had been requested by the Commission at its sixty-eighth session. Lastly, there was a section on the final form of the Commission's output. The written comments and observations received from Governments were also set out in document A/CN.4/716, which had been issued after the submission of his report. He had been impressed by the seriousness with which Governments had addressed in detail many aspects of the methodology for the identification of rules of customary international law. Over the previous four sessions of the General Assembly, debates on the topic in the Sixth Committee had been stimulating and valuable.

In the context of the topic in question, commentaries had been adopted for the first time only at the Commission's sixty-eighth session in 2016. The Commission had been able to integrate the comments made by States in the Sixth Committee each year between 2013 and 2015 as it refined the draft conclusions and before it started work on the commentaries, and this input had had a considerable influence. His report thus focused on the deliberations of the Sixth Committee in 2016, at the seventy-first session of the General Assembly, which had been the first occasion for States to comment on the full set of 16 draft conclusions with commentaries. While the Commission often regretted not receiving more written comments from States, in relation to the present topic the richness of the debate in the Sixth Committee had to some extent made up for that.

In the introduction to his report, he had briefly described the procedural history of the topic. The proposal for a topic, then entitled "Formation and evidence of customary international law", had been discussed in the Working Group on the Long-term Programme of Work at the sixty-second and sixty-third sessions of the Commission, in 2010 and 2011, with the enthusiastic support of the Chair of the Working Group, Mr. Candioti. At its sixty-fourth session, in 2012, the Commission had placed the topic on its programme of work and held an initial debate. Work had begun in earnest at the following session. Members of the Commission had considered his first report, which had dealt with custom as a source of international law generally, as well as with the scope of the topic and the range of materials to be consulted. They had been assisted by an impressive memorandum by the Secretariat entitled "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic" (A/CN.4/659). That memorandum had set out the Commission's own practice in identifying customary international law, based on much painstaking and perceptive research, and had provided 31 observations, the substance of which converged with several of the draft conclusions that the Commission had proposed on first reading under the present topic. The London Statement of Principles Applicable to the Formation of General Customary International Law adopted in 2000 by the International Law Association had also been of great assistance to the Commission.

In Chapter I of the fifth report, he addressed the oral and written comments and observations of Governments and, where relevant, explained his own suggested changes to the draft conclusions and commentaries, which could be found in the annex. In that regard, two typographical errors in the English version of the annex should be noted: in draft conclusion 4 (Requirement of practice), paragraph 2, the word "contributes" should read "contribute", and in draft conclusion 6 (Forms of practice), paragraph 1, the word "includes" should read "include". Overall, in the light of the comments received, he did not believe that radical revisions of the draft conclusions would be warranted; yet the proposed changes would certainly constitute improvements. He had also suggested in places some refinements to the commentaries, but those could be finalized only once the draft conclusions had been adopted on second reading. It would be useful for the Commission to establish an open-ended working group, as it had done in 2016, to review the suggested changes to the commentaries before they were submitted for translation, without prejudice to the usual process of review that took place as part of the adoption of the annual report at the end of the session. It was his understanding that Mr. Vázquez-Bermúdez would be willing to chair the working group.

Chapter I.A of the report addressed general comments made by States. Broadly, States had welcomed the draft conclusions, which was a clear indication that the Commission was on the right lines. Nonetheless, some States had referred to the need to indicate clearly, in a draft conclusion or in the commentary, that a rigorous and systematic approach was needed in the identification of rules of customary international law, and that the task involved an exhaustive, empirical and objective examination of available evidence. While he believed that those points were already clear in the draft conclusions and commentary adopted on first reading, he was open to including some such language in the commentary.

Another important point that had been raised had to do with the need to strike an optimum balance between the draft conclusions and the commentary. The

Commission had been conscious of that need throughout its work, and he believed that the current balance was broadly correct. In one or two places, he agreed that elements of the commentary could with advantage be included in the text of the draft conclusions. It would also be helpful to include at the outset of the general commentary the following sentence from a footnote in the text adopted on first reading: "As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries."

In the report, he had also addressed the suggestion by some States that, in two specific respects, the draft conclusions did not reflect the existing methodology for the identification of rules of customary international law. It had certainly not been the Commission's intention to depart from the existing methodology; he believed that it had followed through on its aim of describing the current state of international law on the formation and evidence of rules of customary international law, without prejudice to developments that might occur in the future.

Turning to Chapter I.B of the report, concerning observations on specific conclusions, he said that States had raised no serious concerns regarding draft conclusions 1 (Scope), 2 (Two constituent elements) and 3 (Assessment of evidence for the two constituent elements). That in itself was very encouraging, given the central importance of those three conclusions. Draft conclusion 4 (Requirement of practice) raised the possibility that the practice of international organizations as such could, under certain conditions, contribute to the formation and identification of rules of customary international law. That seemed to be among the more controversial issues in the draft. Before addressing that issue, he wished to suggest two essentially drafting changes: first, the words "of a general practice" should be moved to appear before the words "as a constituent element of customary international law" and, secondly, in all three paragraphs, the phrase "formation, or expression" should be replaced with "expression, or creation" ("expressive, or creative" in paragraph 1). Since changing the title of the topic, the Commission had largely avoided using the word "formation", and its use in draft conclusion 4 was somewhat anomalous. The phrase "expressive, or creative" would reflect the language used by the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. Placing the concept of "expression" first would also help to place the emphasis on identification rather than formation.

With regard to the main issue of substance concerning draft conclusion 4, namely the role of practice of international organizations, paragraphs 35 to 39 and 41 to 49 of the report set out the differing positions of States and his own views regarding the way forward. In addition to what was said in the report, he had recently become aware of further important practice, where over 60 States had recognized the possible relevance of the practice of international organizations to the creation and expression of customary international law: the General Conditions for Sovereign-backed loans adopted by the Asian Infrastructure Investment Bank in 2016. He believed that improvements, particularly in the sense of clarifications, could and should be made to draft conclusion 4 and the commentary thereto. Some States had stressed that the draft conclusion did not bring out sufficiently clearly the primary role of the practice and *opinio juris* of States. At the same time, a significant number of other States had insisted, in line with the draft conclusion, that, in today's world, international organizations could and did inevitably play a role, under certain conditions, in the development and expression of customary international law. As he had sought to make clear, he did not understand any of the comments as denying either of those propositions. It should therefore be possible to find a form of words that met the concerns of all sides. Although, the first-reading text had been criticized from all sides, he believed that it came close to striking a good balance, but there was nevertheless room for improvement and that was precisely the purpose of the second-reading stage. His suggested changes were intended as an attempt to find common ground and reflect more accurately the current position. They should be read alongside the proposed changes to the draft commentary.

Draft conclusion 6 (Forms of practice), while not controversial, had elicited some interesting suggestions, particularly with regard to the reference to inaction in paragraph 1. He had suggested a possible reformulation using the term "deliberate" to qualify inaction, as had already been done in the draft commentary.

Some States had considered paragraph 2 of draft conclusion 7 (Assessing a State's practice) to be too absolute, despite the Commission's deliberate insertion of the word "may". He had suggested adding the words "depending on the circumstances" in order to make it absolutely clear that the provision was not intended to state an absolute rule. The commentary already explained the type of circumstances that should be taken into account.

With regard to draft conclusion 8 (The practice must be general), some States had asked for a more accurate characterization of the generality of practice. He had therefore suggested including in paragraph 1 the words "virtually uniform", which were consistent with

the language of the International Court of Justice in the *North Sea Continental Shelf* cases. A number of States had urged that greater attention should be paid to the concept of "specially affected States" and proposed the inclusion of the term in the draft conclusion itself, rather than it merely being referred to in a footnote to the commentary. He shared that view and hoped that the Commission would revise the draft conclusion accordingly, perhaps along the lines of the text proposed in his second report (A/CN.4/672).

States had generally welcomed draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences). Nevertheless, for the sake of consistency throughout the text of the draft conclusions, the word "establishing" in paragraph 2 could be replaced with "determining". It would also be useful to insert the words "in certain circumstances" to emphasize the caution needed in approaching resolutions, a point that had already been made in the commentary. That change would also mirror the language used by the International Court of Justice in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*.

States had once again broadly welcomed draft conclusion 15 (Persistent objector), with some useful suggestions being made, particularly for the commentary. One issue that continued to attract considerable comment was the question of whether persistent objection could be made to a norm of *jus cogens*. He thought that it was widely understood that the matter would be addressed under the topic "Peremptory norms of general international law (*jus cogens*)". But the Commission might wish to consider including in the draft conclusion a new paragraph 3, in order to reflect more clearly the point already made in the commentary that the draft conclusion was without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

Several comments had been made regarding draft conclusion 16 (Particular customary international law). However, the only change he had suggested was a drafting one, namely to take the words "among themselves" from the commentary and add them to paragraph 2, which would thus read "that is accepted by them as law among themselves (*opinio juris*)". He believed that that formulation would usefully emphasize that a rule of particular customary international law must be one that the States concerned accepted as a rule among themselves, not as a general rule of international law.

Turning to Chapter II of the report, he recalled that at its sixty-eighth session, in 2016, the Commission had requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement. A similar survey undertaken on the occasion of the first session of the Commission, in 1949, in preparation for the Commission's consideration of the matter pursuant to article 24 of its Statute, had proved influential in making international law materials more accessible. Among the legal publications in the field of international law that had been instituted by the General Assembly as a result of that earlier study were the *Reports of International Arbitral Awards*, the *United Nations Juridical Yearbook* and the *United Nations Legislative Series*. There was a huge difference between the 1949 and 2018 memorandums, given that the world of international law, and the way in which relevant international legal materials were made available, had changed dramatically over the past 70 years, but there was also continuity. In its new memorandum (A/CN.4/710), the Secretariat described in some detail the resources that were currently available and made a number of suggestions for further improving the availability of the evidence of customary international law. In so doing, it referred to the critical importance of the continuous development of libraries specializing in international law and the guarantee of their general access by the public, an observation that he particularly supported. In that regard, he expressed his gratitude to the library of the United Nations Office at Geneva and paid tribute to its long-standing librarian, Ms. Irina Gerassimova, who had recently passed away. She had been of immense assistance to many members of the Commission and had made a great contribution to international law.

In his report, he had recommended that the Commission should endorse the Secretariat's suggestions and forward them to the General Assembly for its consideration. He had also recommended that the memorandum should be reissued in due course to reflect the text of the draft conclusions and commentaries adopted on second reading. He was grateful to the Secretariat for the memorandum and for its previous studies on the topic under consideration. It was to be hoped that, during the Commission's debate, members would comment on the latest memorandum. To that end, it would be good practice for members of the Secretariat regularly to introduce to the Commission the studies prepared at its request, reflecting the important substantive role they often played in its work. The Working Group on Methods of work might wish to discuss more broadly the role of the Secretariat, which

had played a more active part in the Commission's debates in the earlier years of its work.

In Chapter III of the report, he had proposed that the final outcome should consist of three components: a set of draft conclusions with commentaries, to be adopted on second reading; the memorandum of the Secretariat; and a bibliography. Some had asked whether the term "guidelines" might be more appropriate than "conclusions" to describe the Commission's output on the topic, given the objective of providing practical guidance on the way in which the existence or otherwise of rules of customary international law, and their content, were to be determined. Although the matter was ultimately one of personal preference, having reflected on the matter he believed that the term "conclusions" was appropriate: it was not inconsistent with the provision of guidance, struck a less dogmatic tone and was familiar from other topics.

In paragraph 129 of the report, he had proposed that the Commission should recommend that the General Assembly take note of the draft conclusions of the Commission on the identification of customary international law in a resolution, annex the draft conclusions to the resolution, and ensure their widest dissemination; commend the draft conclusions, together with the commentaries thereto, to the attention of States and all those who might be called upon to identify rules of customary international law; and welcome the memorandum of the Secretariat and decide to follow up the suggestions therein.

He would be interested in hearing members' views regarding the suggested changes to the draft conclusions; any other changes that might be made; the question of whether to retain the word "conclusions" or adopt some other term; the proposed recommendations to the General Assembly; the question of whether the draft conclusions should be referred to the Drafting Committee, as he recommended; and any additions, in any language, to the draft bibliography, which would be reissued as annex II to his fifth report.

The Chair paid tribute to the memory of Ms. Irina Gerassimova on behalf of the members of the Commission.

Mr. Nanopoulos (Codification Division), introducing the memorandum by the Secretariat entitled "Ways and means for making the evidence of customary international law more readily available" (A/CN.4/710) said that, since the previous survey undertaken in 1949, the evidence of customary international law and its availability had changed dramatically, owing in particular to an increase in the number of States and international organizations and to the development of international law in various fields. The main aim of the 1949 study had been to remedy the scarcity of evidence concerning international law and its limited dissemination. In that regard, some difficulties still persisted, while other challenges had emerged.

More than 2,500 bibliographic resources had been collected from four sources: States Members of the United Nations and non-member States; entities in the United Nations system and entities and organizations with a standing invitation to participate as observers in the work of the General Assembly; academic research centres, libraries and the Global Network for International Law; and research undertaken by the Codification Division. The material had been organized into six annexes as follows: (I) resources by State; (II) resources by organization; (III) resources by field of international law; (IV) collections of treaties and depositary information; (V) resources relating to international courts and tribunals, hybrid courts and treaty-monitoring bodies; and (VI) resources relating to bodies engaged in the examination, codification, progressive development or harmonization of international law. Annex VII contained a list of the 91 languages of the resources collected.

Chapter I of the memorandum reviewed the evidence collected, analysed the current state of the evidence and considered potential obstacles to its availability. A strictly bibliographic approach had been followed in reviewing the evidence; it was presented by category of resource and the links to the various draft conclusions as provisionally adopted on first reading in 2016 were analysed. In the memorandum, the Secretariat sought to indicate to those called upon to apply customary international law where they could find information relevant for the identification of a specific rule and its content.

With regard to the potential obstacles to information access, certain categories of evidence, such as the executive practice of States, were still not readily available and there were significant regional disparities. Furthermore, the confidential nature of many documents was an obstacle to the identification of certain rules of customary international law. Such disparity in the availability of some categories of evidence further reinforced the need for specialized bibliographic resources specifically devoted to international law; however, such resources were still limited in number, with great disparities across regions. Another fundamental obstacle was that much information was available only in one language. Multilingualism therefore seemed essential in order for the evidence of customary international law to be truly available worldwide. In that regard, publications by international

organizations were of particular interest, since multilingualism was more developed therein than at the national level. The digital divide was a clear obstacle to information access, since most resources were available online, exclusively so in many cases. It was vital that printed publications continued to be produced and that libraries, particularly those specialized in international law, continued to exist, as they were often the only places where certain resources could be accessed and they also provided the necessary expertise for navigating through documentary collections. In that connection, he paid tribute to Irina Gerassimova on behalf of the Secretariat. Through her invaluable advice, she had made a vital contribution to the present memorandum and many others. The vast amounts of information available could make it difficult to identify which sources were relevant. In order to navigate through such information in a systematic manner, it was first necessary to consider which subset of potentially relevant information was actually relevant to the rule at hand. Secondly, it might be possible to identify specialized bibliographic resources that focused on the field of international law under consideration. Thirdly, the identification of a rule of customary international law might be usefully sustained by research already carried out elsewhere. In that regard, those sources that were defined as subsidiary means for the determination of international law under article 38 (1) of the Statute of the International Court of Justice might be considered to have the greatest importance in practice.

Chapter II contained a number of suggestions for improving the availability of the evidence of customary international law, which fell into four categories: (1) suggestions concerning ways and means for States to make the evidence of their practice and acceptance as law (*opinio juris*) more readily available; (2) suggestions concerning ways and means for the United Nations to maintain and develop its legal publications relevant to international law and ensure their widest dissemination; (3) suggestions concerning ways and means for enhancing the availability of evidence of customary international law in the context of the progressive development and codification of international law; (4) suggestions concerning a periodically updated online database for the systematic and comprehensive dissemination of bibliographic information on the evidence of customary international law.

In paragraph 126 of his report, the Special Rapporteur recommended that the Commission should endorse the Secretariat's suggestions, and forward them to the General Assembly for its consideration. He also recommended that the memorandum should be reissued in due course to reflect the text of the draft conclusions and commentaries adopted on second reading. The Secretariat stood ready to implement such recommendations if so decided by the Commission and the General Assembly.

Mr. Park said that he was grateful to the Special Rapporteur for his report, which clearly summarized and explained the comments and observations of States on the draft conclusions and commentaries adopted on first reading. Noting that 16 States had transmitted written comments, he said that more observations should be gathered, given the importance of the topic. He was concerned that the Special Rapporteur appeared to lean towards a voluntarist approach to the formation of customary international law, as opposed to an objectivist approach, as evidenced by his renewed proposal to replace the words "formation, or expression" with the words "expressive, or creative" in draft conclusion 4, by the proposal to attribute a more limited role to international organizations and by the recommendation that the persistent objector rule should be retained in draft conclusion 15.

Concerning draft conclusion 2, he agreed with the Special Rapporteur that some changes to the commentary might be necessary, in order to clarify the reference to "deduction" and thereby address the concerns raised by some States. With regard to draft conclusion 4, paragraph 1, he did not agree with the Special Rapporteur's proposal to replace "formation, or expression" with "expressive, or creative". The Special Rapporteur had made the same suggestion in his fourth report, but it had not been adopted by the Commission. The wording "formation, or expression" was more commonly used in the context. As for paragraph 2, although States' views differed on the practice of international organizations, he was concerned that the addition of the word "may", as suggested by the Special Rapporteur, would diminish the role of international organizations in the identification of customary international law. He was also opposed to the replacement of the term "formation, or expression" with the phrase "expression, or creation", for the reasons previously mentioned. Given the important role of international organizations in identifying customary international law, paragraph 2 should be retained as it stood.

With regard to draft conclusion 5, the Special Rapporteur, in paragraph 50 of his report, considered the question of whether State practice must be publicly available or at least known to other States in order to give them the opportunity to object. It was an important issue that had been commented on by a number of States and should be revisited by the Commission.

Regarding draft conclusion 6, the Special Rapporteur had recommended adding the word "deliberate" before "inaction" in paragraph 1, in response to comments made by States. However, doing so would reduce the scope of the inaction and might lead to problems with regard to the burden of proof. It should be noted that draft conclusion 10, paragraph 3, also dealt with the issue of inaction, but there was no mention of "deliberate". Coordination between those two paragraphs should be considered. Lastly, in paragraphs 57 and 58 of his report, the Special Rapporteur had asked whether the Commission wished to reconsider the order in which possible forms of practice were listed in paragraph 2 and to consider whether the clarification made in paragraph 3 should be retained or moved to the commentary. In response to both questions, he himself would prefer to maintain the current formulation.

With regard to draft conclusion 8, paragraph 1, the Special Rapporteur had suggested replacing the word "consistent", which had been used by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* with the term "virtually uniform", as used by the Court in the *North Sea Continental Shelf* cases. Since both "consistent" and "virtually uniform" seemed appropriate as criteria for determining the threshold for generality of practice, it would be necessary, if the Special Rapporteur's recommendation were to be adopted, to explain in the commentary why those words had been chosen over other language used in the Court's judgments.

The matter of "specially affected States" in relation to draft conclusion 8 remained unresolved. He had agreed with the Special Rapporteur's previous proposals on the subject that due regard should be given to the practice of "specially affected States" in the formation of customary international law. Although some members of the Commission had been opposed to that proposal because it ran counter to the principle of the sovereign equality of States, the issue was always part of the consideration of the formation of customary international law.

Regarding draft conclusion 12, paragraph 2, he supported the Special Rapporteur's proposal to add the words "in certain circumstances", which would better reflect the potential role of resolutions, and to replace the word "establishing" with "determining" in order to enhance the overall consistency of the draft conclusions.

The text of draft conclusion 15 had been refined, which might diminish the possibility of abusive reliance on the persistent objector rule. However, he still objected to the inclusion of that controversial rule in the draft conclusions. Over the past quinquennium, he, together with Mr. Caflisch and Mr. Forteau, had "persistently objected" to draft conclusion 15. Since the Commission was in the final stages of its deliberations on the topic, he would not block consensus on the adoption of the draft conclusion. However, he wished his views to be placed on record. There were three reasons why he objected to the persistent objector rule. First, it was based on a position that emphasized voluntarism over objectivism or the spontaneous formation of customary international law. Secondly, its inclusion presupposed that it was an uncontroversial rule established by general international law. However, States' divergent views on the subject had been clearly documented in the topical summary of the discussions held in the Sixth Committee in 2015 (A/CN.4/689, para. 26). Thirdly, while the Special Rapporteur asserted in his report that persistent objection had been recognized in international practice, by doctrine and by the Commission itself, the practice of States was insufficient, and other views could be found among scholars. Consequently, he doubted whether the Commission was transmitting an accurate message to lawyers and State officials who were not fully conversant with the theory of international law.

Turning to draft conclusion 16, he noted that the Special Rapporteur, although he had not recommended any changes to paragraph 1, had suggested that it could be reformulated to indicate that rules of particular customary international law "include those that are regional or local", with an explanation in the commentary that, while those were the principal manifestations, it was not excluded that there could be "other" ones. In his view, paragraph 1 should remain unchanged. Over the past quinquennium, the Commission had had interesting discussions on draft conclusion 16, including on the opposability of regional customary international law to third States. The Commission had concluded that a rule of particular customary international law by itself created neither obligations nor rights for third States. Nevertheless, in his view, some theoretical questions remained, such as whether a rule recognized as customary international law by many States was in the process of becoming a rule of general customary international law, or whether it remained a rule of particular customary international law that applied among a large but still "limited" number of States. Another question was whether a State that was worried that a rule of particular customary international law might become a rule of general customary international law was required to react pursuant to draft conclusion 10, paragraph 3, and draft conclusion 15. Such questions related to the blurred line

between general customary international law and particular customary international law.

The Commission had also discussed, in relation to draft conclusion 16, the question of "other" forms of particular customary international law, which could develop among States on the basis of factors other than their geographical position, such as a common cause, interest or activity. The concept had become more relevant in the current highly-connected world, in which other forms of particular customary international law might be formed more easily than before. For example, a group of States with no geographical or regional relationship might recognize the right of asylum from a humanitarian perspective, or a coalition of like-minded countries might carry out a humanitarian armed intervention in response to the use of chemical weapons by a State against its own civilians.

Regarding Part III of the report, he appreciated the Secretariat's efforts in preparing the memorandum and fully supported its suggestions for improving the availability of customary international law. He hoped that the Secretariat would continue to add resources as needed, and to reanalyse and reclassify them. He concurred with the Special Rapporteur that the Commission should forward the Secretariat's suggestions to the General Assembly for its consideration.

Turning to Part IV of the report, he said that he agreed with the final form of the Commission's output as proposed by the Special Rapporteur, and with the use of the term "conclusions" for the present topic. He hoped that the draft conclusions would be adopted on second reading during the current session.

The meeting rose at 12.45 p.m.